

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-212191.2

DATE: April 17, 1984

MATTER OF: Holmes & Narver Services, Inc., and
Morrison-Knudsen Company, Inc.

DIGEST:

Prior decision is modified to permit a cost comparison that avoids an erroneous comparison. Overhead costs that are not eliminated when the operation is contracted out are not required to be charged to the in-house operation.

Headquarters, United States Army Materiel Development and Readiness Command, requests clarification of Holmes & Narver Services, Inc., and Morrison-Knudsen Company, Inc., B-212191, November 17, 1983, 83-2 CPD 585, in which we sustained a protest by Holmes & Narver Services, Inc., and Morrison-Knudsen Company, Inc. (HN/MK), a joint venture, against an Office of Management and Budget (OMB) circular A-76 cost comparison conducted by the Redstone Arsenal, United States Missile Command, Procurement and Production Directorate, Huntsville, Alabama (Redstone), under request for proposals Nos. DAAH03-82-R-0033 and DAAH03-82-R-0002.

In the November 17 decision, we held that OMB's Transmittal No. 6 (TM-6), 47 Fed. Reg. 4629, February 1, 1982, modification of the OMB circular A-76 cost comparison handbook, was applicable to this A-76 cost comparison. We therefore agreed with HN/MK that the Army's failure to apply TM-6 had erroneously resulted in the addition of underutilized personnel costs to HN/MK's offer which caused it to be overstated by \$15.9 million. It is now clear to us that the use of TM-6 will lead to an erroneous cost comparison, and therefore we modify our prior decision.

Briefly, underutilized personnel costs are in-house overhead costs which are incurred regardless of whether the services involved are performed in-house or by contract. Prior to TM-6, these costs were charged to both the in-house and contracting out cost estimates for purposes of an A-76 cost comparison. TM-6 provided that these costs

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should not be charged to the costs of contracting out, since the personnel would be assigned to other tasks at the installation. If TM-6 is applied to the cost comparison, underutilized personnel costs would not be charged to the costs of contracting out, but would continue to be charged to the in-house cost estimate.

As the United States Army Audit Agency (AAA) points out to us, however, the \$15.9 million personnel costs involved here will be incurred whether the services are performed in-house or by contract operation. If these costs are omitted from the costs of contracting out but are still added to the in-house costs, as required by TM-6, the resulting cost comparison will be erroneous.

AAA notes in this regard that the TM-6 method is no longer in effect. Circular A-76, revised effective August 1983, specifies a method of cost comparison whereby the only overhead costs charged to the in-house operation are those costs which are eliminated by converting to contract. Under the revised A-76, underutilized personnel costs would not be charged to the in-house operation.

It appears that the Army recognized in early 1982 that an alternate to TM-6 was needed. AAA reports that soon after TM-6 was issued the Army instructed its activities to use an alternate cost comparison method in lieu of TM-6, one which only charges overhead costs to the in-house operation that are eliminated when the operation is contracted out. Thus, Army authorized use of a method similar to that adopted by OMB in 1983.

The protester nevertheless argues that TM-6 was a binding regulation having the force and effect of law, which the Army was required to follow while that regulation was in effect. We do not agree that TM-6 was a binding regulation. Rather, A-76 and its amendments, which included TM-6, are policy directives which are to be followed by executive agencies, and are not subject to legal review. See General Telephone Company of California, B-189430, July 6, 1978, 78-2 CPD 9, and cases therein cited.

We review an agency determination under A-76 only when the agency utilizes the procurement process to aid in its policy decisionmaking under A-76. We review the process solely to assure that a determination to perform in-house,

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rather than to award a contract, is not the result of a faulty or misleading cost comparison. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38. Our prior decision was based on the premise that because TM-6 was in effect when offers were submitted for these procurements, it should be applied in order to assure a proper and fair cost comparison. Because it is now clear to us that use of TM-6 will have the opposite result, we think the Army should be permitted to use the alternate cost comparison method for these procurements in order to avoid an erroneous cost comparison.

Our prior decision is modified accordingly.

for Milton F. Auster
Comptroller General
of the United States